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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1111

AUGUSTINE L. RANJEL, *et al.*,

Petitioners,

v.

CITY OF LANSING, GERALD W. GRAVES, Mayor of Lansing, and THEO W. FULTON, Clerk, City of Lansing.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITY OF LANSING, GERALD W. GRAVES, Mayor of Lansing, and THEO W. FULTON, Clerk, City of Lansing.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on October 28, 1969.[1]

Citations to Opinions Below

The opinion of the District Court, filed January 8, 1969, is reported at 293 F. Supp. 301 and is printed in the appendix, *infra* pp. 3a-25a. The opinion of the Court of Appeals is reported at 417 F.2d 321 and is printed in the appendix, *infra* pp. 27a-34a.

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[1] Petitioners are Augustine L. Ranjel, Asencion de Leon, Jr., Virginia Arriaga Williams, Macedonia Ayala, Betty Basey, Ira Q. Miller, Antonio M. Lira, Geraldine Hicks and Ruby Mack.

Jurisdiction

The judgment of the Court of Appeals was entered on October 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Implementing policies of the United States Department of Housing and Urban Development which were formulated in accordance with Title VI of the Civil Rights Act of 1964 and are fully supported by the Fair Housing Act of 1968, the City of Lansing approved a zoning change to allow construction of single family row houses for low-income families and a multiple dwelling for the elderly poor in a white single family detached home residential area. The proposed housing would enable some poor blacks and Mexican-Americans to live outside Lansing's racial ghetto and provide relocation housing for people displaced by highway construction and publicly assisted industrial expansion in the ghetto. An organization known as the Committee for Individual Homes petitioned for a referendum to invalidate the zoning change but the referendum was enjoined by the United States District Court which ordered municipal officials to implement previously approved plans for the housing development. The United States Court of Appeals for the Sixth Circuit reversed. Should the referendum be enjoined on the grounds that (1) denial of the zoning change would serve no legitimate governmental interest and discriminate against poor blacks and Mexican-Americans in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and (2) denial of the zoning change would violate the Supremacy Clause by frustrating the vitally important national policy of providing federally assisted housing for the poor outside racial and economic ghettos?

Constitutional Provisions, Statutes, and Regulations Involved

1. This case involves the Supremacy Clause, and the Thirteenth and Fourteenth Amendments to the United States Constitution.

2. This case also involves the Fair Housing Act of 1968, 42 U.S.C. §3608(d); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d and d-1; 24 C.F.R. §1.4(a) and (b)(2); the United States Department of Housing and Urban Development's Low Rent Housing Handbook, RHA 7410.1, Chapter 1, Section 1(2)(a)(6) and (g);[2] the Lansing, Michigan City Charter, §§6.9-6.13 (1958); and the Lansing, Michigan Zoning Ordinance, §§36-7, 36-17, and 36-44 (1966). They are set forth in the appendix, *infra* pp. 35a-46a.

Statement of the Case

Summary of Proceedings in the Courts Below

Poor black and Mexican-American residents of Lansing, Michigan's ghetto (petitioners here) began this action after a group of Lansing residents, known as the Committee for Individual Homes, successfully petitioned for a referendum to repeal a zoning change required to construct a federally assisted low rent public housing project (popularly known as "Jolly-Cedar") in a white residential section of Lansing. The action seeks to enjoin the referendum and require

[2] In both opinions below, HUD's site selection regulation is cited to Low Rent Housing Manual, §205.1(4)(g). Since then the Department has reorganized (without revising) its basic regulations into a Low Rent Housing Handbook. The Handbook section cited above is identical to the Manual provision in effect during the hearings below. Citations hereafter will be to both Handbook and Manual, where appropriate.

municipal officials to implement previously approved plans to construct the project.

The complaint, filed June 28, 1968 in the District Court for the Western District of Michigan, alleges that the threatened use of Lansing's zoning power by means of a municipal referendum to prevent low income blacks and Mexican-Americans from obtaining housing in white residential areas denies their rights to Due Process and Equal Protection of the Laws. Additionally, petitioners allege that the Supremacy Clause of the United States Constitution prohibits the use of the zoning power to frustrate the national policy of promoting equal housing opportunities established by Title VI of the Civil Rights Act of 1964, the affirmative action requirements of the Fair Housing Act of 1968, and regulations of the United States Department of Housing and Urban Development. Petitioners claim that they need immediate relief as public projects and actions are displacing large numbers of low income blacks and Mexican-Americans and forcing them to move to substandard, segregated, overcrowded, and costly housing.

Following an evidentiary hearing the District Court preliminarily enjoined the referendum finding that "plaintiffs are of a class that would benefit from the project, and that therefore they have standing to bring this suit" and "that if the referendum is successful, the federal housing program in the Lansing area will be seriously impeded, and plaintiffs will suffer irreparable harm" (1a). Prior to the final hearing, the parties agreed on the facts established at the July hearing and entered into an extensive stipulation. The Court held further hearings and then acted with the urgency expressed by the City's previous recognition that "any and every delay in the development and completion of the above-described housing project will cause needless suffering and want in the City of Lansing among persons of low income

and will substantially contribute to those conditions which breed and encourage hatred, civil disobedience and public violence in the city" (24a).

The District Court's findings of fact emphasized the abject conditions of Lansing's black and Mexican-American ghetto: overcrowded and substandard housing, disease, segregated education, discriminatory displacement by public projects, and a level of municipal services lower than elsewhere in the city. Additionally, the Court emphasized that discrimination and poverty joined to prevent ghetto residents from moving elsewhere, and that Jolly-Cedar was planned "in response to these problems" (5a). The Court's opinion recited the history of the Jolly-Cedar project, noting particularly that municipal officials selected a site in a white single family residential neighborhood to comply with federal regulations requiring the selection of low rent housing sites outside racial ghettos and that the City Council itself determined that the necessary zoning change is "consistent with the intent and purpose of public health, safety, morals, and general welfare" (6a). Stressing the uncontroverted testimony of Lansing's own City Planner that the purpose of the referendum is to prevent low income families, many of whom would be black, from moving into the Jolly-Cedar neighborhood (11a), but also looking at "all the evidence" (13a), the Court found that the effort to deny the zoning change "is in major part based on economic and racial discrimination in housing" (11a). The Court also held the repeal of the zoning change would have a "discriminatory effect" on blacks and Mexican-Americans (23a), and concluded that the Fourteenth Amendment prohibited the referendum. The Court further ruled that denial of the zoning change would violate the Supremacy Clause by seriously impeding the federal policy of providing low rent housing opportunities outside racial ghettoes. Accordingly, the Court enjoined the referendum and ordered

municipal officials to process plans for the construction of Jolly-Cedar (26a).

The Court of Appeals reversed. In a per curiam opinion the Court first dismissed the District Court's findings concerning "the tragic conditions affecting the poor black and Mexican-Americans living in the slum areas in Lansing," by observing that "these conditions, however, concerning the plight of the poor, were not peculiar to Lansing nor indeed to the United States, but have existed for centuries in many places throughout the world" (28a). The Court then proceeded to hold that there was no conflict between a valid federal law and state law because HUD's site selection regulation "does not rise to the dignity of federal law" (30a). Even assuming the validity of the regulation, the Court found no prohibited conflict with federal law because in its view the referendum would not be discriminatory but based on neutral principles (30a). While the Court acknowledged that Lansing's own City Planner testified that the residents of the area of the proposed project were opposed to low income people moving into their neighborhood, and that many of these people would be black, the Court set aside the District Court's finding that the referendum was motivated by racial and economic discrimination (32a). The Court of Appeals further held that "if the electors had a legal right to a referendum, their motive in exercising that right would be immaterial" (32a). While expressing its opinion that the better practice is to allow the election and rule on its validity subsequently, the Court reached the ultimate issue and ruled that if Lansing's voters repeal the zoning change they will not violate the Fourteenth Amendment (32a). The Court's opinion also suggests that if the zoning change is denied that blacks and Mexican-Americans might not be harmed because in its view 100 low cost homes could still be built under the present "A" single family zoning (32a).

On November 26, 1969, the Court of Appeals stayed the issuance of its mandate pending the timely filing of this petition. In accordance with Rule 41(a) of the Federal Rules of Appellate Procedure the mandate will remain stayed and the referendum enjoined until this Court rules on this petition.

Summary of Facts

The determinative facts of life for poor blacks and Mexican-Americans in Lansing are the deprivations of an economic and racial ghetto (4a).[3] A large percentage of ghetto housing imperils the health, safety, and welfare of its residents (Stip. ¶7).[4] Infant mortality is 50% higher, the incidence of tuberculosis 2½ times greater, and numerous other diseases far more prevalent in the ghetto than elsewhere in the city (4a). Ghetto children receive an inferior segregated education (4a), and the City provides a lower level of municipal services there. Highways and industrial expansion in the ghetto displace thousands of blacks and Mexican-Americans from their homes while the City fails to provide adequate relocation housing (4a; Stip. ¶11).[5]

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[3] Approximately 16,000 of Lansing's 133,000 residents are black or Mexican-American, and 65% of this minority population live in an area containing only 11% of Lansing's total population (4a). One 51-block section is 91% black (Stip. ¶5). A high proportion of ghetto residents are poor: 32.4% have annual incomes below $3,000, and 23.9% have annual incomes between $3,000 and $5,000 (Stip. ¶6). Citation references to "Stip." are to the parties' stipulation below.

[4] Forty (40) per cent of the ghetto's housing is substandard; 35% more is dilapidated (4a); 55% of the City's poor housing is located in areas housing 88% of Lansing's black population (Stip. ¶7); a full one-third of the housing in the ghetto is overcrowded (4a).

[5] Although less than 15% of Lansing's population is black and Mexican-American, over 50% of those displaced have been from these groups (5a).

Ghetto residence is not voluntary. As the City admits, "(the) ghetto was created by discrimination and poverty" (Stip. ¶10), and its residents are "required to reside there by virtue of their race, ethnic background, and poverty" (Stip. ¶7). Not only does discrimination limit the ability of blacks and Mexican-Americans to leave the ghetto (Tr. I, 123) but the location in the ghetto of 90% of all low income housing in Lansing further restricts their ability to find housing outside the ghetto (4a). As a result the southern part of Lansing, where the Jolly-Cedar project is planned, is almost exclusively white (4a). Freedom to leave the ghetto, if it is to come, will only be through public programs as wholly private housing is beyond the economic means of ghetto residents (Stip. ¶12).

The City responded to these problems in 1965 by establishing a commission to construct and manage low rent housing projects (Stip. ¶13).[6] Lansing's needs persuaded the Department of Housing and Urban Development ("HUD") to agree to finance 1,000 public housing units (5a),[7] and the Housing Commission then selected sites for low rent projects. In compliance with federal regulations, only sites situated outside Lansing's black and Mexican-American ghetto were selected (5a).[8] One site was Jolly-

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[6] Lansing was a late starter in building low rent public housing. Lansing's commission was established 32 years after the enactment of state legislation enabling the formation of such commissions (Stip. ¶13). In contrast, displacement activities had been going on since the end of World War II (Tr. I, 55).

[7] These units are only a beginning. The City acknowledges that "several thousand units of low rent housing are necessary to provide decent, safe and sanitary housing for low income persons residing in the City of Lansing" (Stip. ¶12).

[8] In its answer, and again by stipulation, the City admitted that HUD's site selection regulations, 24 C.F.R. §1.4(b)(2) and Low Rent Housing Handbook, RHA 7410.1, Chapter 1, §1(2)(g), "require that low rent public housing sites be selected outside racial ghettos in order to foster residential integration" (Stip. ¶14). On appeal, the City reneged and denied that the Handbook was a regulation.

Cedar, a 20-acre parcel located in a white neighborhood in the southern portion of Lansing (5a). Among the reasons for selecting Jolly-Cedar are the facts that black and Mexican-American children moving there will attend integrated schools, and it is accessible to employment, transportation, shopping and health facilities (5a-6a). The Michigan Civil Rights Commission and HUD determined that the site complies with Title VI and HUD's regulations (6a).

The Housing Commission decided to develop Jolly-Cedar through a HUD program which departs from traditional methods of requiring housing authorities to acquire land and bureaucratically monitor construction. The new program, called Turnkey, allows private developers to acquire property, build, and then sell completed housing to local authorities. It more fully utilizes private industry and enables faster and less expensive development of new low rent housing (6a). However, Turnkey developers must obtain zoning changes in the same way developers constructing private housing are required to do.[9]

The developer selected by the Housing Commission agreed to construct 100 town houses for low-income families and a five story 150 unit apartment building for elderly persons with low incomes.[10] As Jolly-Cedar is in an "A" single family residential district, these plans require a zoning change. The present zoning permits only single family

[9] If the Lansing Housing Commission had decided to foresake the efficiency advantages of the Turnkey Program and acquire the Jolly-Cedar property itself (risking potentially lengthy condemnation litigation) it would *not* have been bound, under Michigan law, by Lansing's zoning ordinance. *Renshaw* v. *Coldwater Housing Commission*, 381 Mich. 590, 165 N.W.2d 5 (1969).

[10] Plf. Exh. No. 16 is a composite graphic presentation of the project including photographs and a site plan approved by the staff of the Housing Commission and Planning Board (Tr. I, 103-104).

fully detached homes with lot areas not less than 5000 square feet per family (Zoning Ordinance, §§36-17 and 36-44). Although each proposed town house for low income families will serve only one family (Tr. I, 103), the use of rows of attached buildings is not permitted. The zoning of the area also prohibits the construction of the five story apartment house for the elderly poor. Moreover, although the density of the housing for low income families is slightly less than the maximum permissible density in the area as presently zoned, the housing for the elderly raises the density for the entire development above the average density allowed in single family districts (Stip. ¶20).[11]

In Lansing there are two ways to obtain zoning changes short of amending the ordinance. One is the traditional procedure of varying the zoning by showing that its strict application results in "unusual practical difficulties or particular hardship" (Zoning Ordinance, §36-12). The other is the approval of a Community Unit Plan which allows relief from use, height, and area regulations upon approval of a planned residential development for single family, two family, or multiple dwellings on large tract of land. No showing of hardship is required. Instead, a

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[11] The density of the 100 town houses for poor families is 8.05 families per acre (Stip. ¶20) obtained by dividing these units into the 12.42 acres on which they will be located (Plf. Exh. No. 3). The average density permitted by the zoning ordinance is 8.7 families per acre, calculated by dividing 5,000 square feet (the minimum lot size in "A" single family zones) into 43,560, the number of square feet in an acre. The 150 units for poor elderly will be located on a 3 acre site (Plf. Exh. No. 3). The zoning ordinance defines each elderly person living alone as a "family". Therefore, although the apartment house for the elderly poor may not house many individuals, its density will be 50 "families" per acre. When the housing for poor families and elderly poor together (250) is considered in relation to the total acreage of the development (approximately 20 acres including recreational space) then the average density for all "families" is approximately 12½ units per acre (Tr. II, 16).

developer submits plans to the Planning Board for study and a public hearing. If the Board approves, the plans are submitted to the City Council with

> "a report stating the *reasons* for approval of the application and *specific evidence and facts* showing . . . (1) That property adjacent to the area included in the plan will not be adversely affected, (and) (2) That the plan is consistent with the intent and purpose of this chapter to promote public health, safety, morals and general welfare"

Approval by the Council allows issuance of building permits even though the use of the land, the density of population, and the height and setbacks of buildings do not conform to the area's zoning (Zoning Ordinance, §36-7).

The developer obtained an option to purchase the Jolly-Cedar site and applied for approval of a Community Unit Plan. As required, his plans were the subject of extensive investigation, public hearing, and study by the City's Planning Board (6a). Notice of the hearing was specifically directed to owners of property located within 300 feet of the project (Tr. I, 107) who appeared and opposed Jolly-Cedar because, as Lansing's own planning officer testified, "the residents in the area surrounding this particular project were opposed to those of low income being moved into the area" (Tr. I, 157).[12] The staff of the Planning Board

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[12] The fact that the proposed development was for low income people was generally discussed at the public hearings on the project (Tr. I, 103). The Court of Appeals relied heavily on the Lansing City Planner's testimony that property owners in the Jolly-Cedar area voiced objections to overloading schools in the district, density, multiple family housing "per se" (Tr. I, 229), and the fact that when they had purchased their homes the area was zoned "A" single family and they did think it "proper" to change it (Tr. I, 239). But the City Planner went on to testify that while the adequacy of schools was a concern "we did plan on this site a school facility to adequately handle the need" (Tr. I, 239), and

recommended approval, noting that "the project will fulfill an acute shortage in the low rent housing market, and provide shelter for families and single individuals being displaced by public improvements" (Tr. I, 107), and both the Planning Board and the City Council found that property adjacent to the proposed development will not be adversely affected[13] and that the Jolly-Cedar plan is consistent with the intent and purpose of promoting public health, safety, morals and general welfare (6a). Accordingly, the Council approved the Community Unit Plan for Jolly-Cedar on May 8, 1967.

An organization known as the Committee for Individual Homes then circulated a referendary petition to repeal the approved plan. After the City Clerk deemed the petition invalid, the Circuit Court for Ingham County ordered the Clerk to accept the petition and the Michigan Court of Appeals affirmed. *Parr* v. *Fulton,* 9 Mich. App. 719, 158 N.W.2d 35 (1968).[14] The City did not appeal to the Michigan Supreme Court, and scheduled the referendum.

This is the first such referendum in Lansing. In recent years the City has approved numbers of community unit

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that none of the testimony on which the Court relied changed his opinion that purpose of the referendum to defeat the Community Unit Plan was to keep low income families, many of whom would be black, out of the Jolly-Cedar neighborhood (Tr. I, 240). The evidence overwhelmingly shows that the impact of Jolly-Cedar's new population on community facilities was well considered: a junior high school is being built on an adjacent site; an elementary school will be built when the project is completed, and a four to five acre recreational area and community facility will be provided (Stip. ¶20). All these will not only benefit Jolly-Cedar but the surrounding neighborhood as well (Tr. II, 19).

[13] In fact, the Council found that "because of the comprehensiveness and the land use relationships the proposed development will have a *minimum* effect on abutting properties" (Plf. Exh. No. 10).

[14] Neither the Circuit Court nor the Court of Appeals decided any of the issues of constitutional or statutory law raised in this case (7a).

plans for construction of multiple dwellings with population densities equal or greater than the proposed Jolly-Cedar project (Stip. ¶22), and some of these have been in the vicinity of Jolly-Cedar (Tr. II, 14-16).[15] With few exceptions community unit plans have provided for the development of middle and upper income housing renting at prices beyond the means of residents of ghetto (6a-7a). Only Jolly-Cedar has been subjected to an effort to repeal by referendum.

There are no plans to build public housing on single family lots in Jolly-Cedar in the event the referendum repeals the zoning change.[16] The only evidence on the feasibility of constructing single family fully detached housing is discouraging. A former director of the Lansing Housing Commission testified that the economic feasibility of single family public housing is "limited", that previously constructed single family public housing units in Lansing have been located on "odd" and "narrow" lots in a "deteriorating" neighborhood, and that a comprehensive housing program in Lansing cannot be done as an entirely single family program (Tr. I, 75-76).[17] Moreover, the City lacks readily

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[15] The testimony of one of petitioners' expert witnesses, a city planner, based on a detailed study of zoning changes in Lansing, is that there is no consistent city policy of maintaining low densities in the area around Jolly-Cedar but rather judgments are made on the merits of individual developments (Tr. II, 16).

[16] Reply Brief of the City of Lansing in the Court of Appeals, p. 17.

[17] The Court of Appeals relies on the Lansing City Planner's testimony that even if Jolly-Cedar's "A" single family zoning remains unchanged, low cost housing can still be built there (32a). All that testimony was meant to convey, as the City acknowledges, is that it is "legally" possible to build low rent housing in a single family zone. The City in addition to admitting that it has no plans to build such housing in Jolly-Cedar states that it doesn't know whether it would be economically feasible to do so. Reply Brief of the City of Lansing in the Court of Appeals, p. 17. In spite of this, the Court of Appeals used the City Planner's testimony to conclude that by dropping the housing for the elderly poor, 100 town houses for low income families could still be built.

available alternative sites to Jolly-Cedar (7a-8a). In the meanwhile, the City continues to cooperate in highway programs and industrial expansion which displaces poor black and Mexican-American ghetto residents from their homes and the shortage of relocation housing continues to force displacees to move to substandard, segregated, overcrowded and costly housing (Stip. ¶11).

REASONS FOR GRANTING THE WRIT

Introduction

Even with their new legal rights to fair housing racial minorities remain confined to unremitting degradation in urban ghettos. The difficulty of escape is compounded because ghetto residents are typically poor as well as nonwhite and low income housing is scarcely available outside ghettos.[18] A significant reason why such housing is unavailable is that local governments often misuse their power to zone and frustrate the implementation of federal programs designed to provide housing in non-ghetto areas. The importance of this case is that it provides an opportunity to assure that public controls over the development of land assist and not deter these important federal efforts.

Zoning's acceptance as a legitimate governmental function resulted from widespread concern with urban congestion. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926); *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927). The concern was limited, however. The advocates of zoning

[18] "Enactment of a national fair housing law will eliminate the most obvious barrier limiting the areas in which nonwhites live, but it will not deal with an equally impenetrable barrier, the unavailability of low and moderate income housing in non-ghetto areas." Report of The National Advisory Commission on Civil Disorders 263 (1968) ("the Kerner Commission").

were primarily attempting to prevent the *spread* of congestion by excluding apartment houses from neighborhoods of single family detached homes. They had no solution, however, for the already congested slums of their time. Zoning was an exclusionary device and existing slums were written off as "already spoiled." [19]

The seriousness of this nation's urban crisis now makes it imperative to consider zoning's effects on the congestion left behind. The slums which zoning's sponsors wrote off a half century ago are now the homes of millions of rural black poor who have migrated to urban ghettos. The federal government which at that time had no commitment to ending urban poverty and racial discrimination now does. Congress has established a national housing goal to provide "a decent home and suitable living environment for every American family" (42 U.S.C. §1441), and assigned "the highest priority" (Pub. L. No. 90-448, §2 (August 1, 1968)) to federal housing programs for the poor. Now the multiple family dwellings which the *Euclid* Court considered "parasites" and items of "business and trade" (272 U.S. at 390, 394) are the mainstay of federal housing programs for the poor which mainly provide rental housing in multiple family developments and require zoning which permits such housing. Report of the National Commission on Urban Problems to the Congress and to the President of the United States, Building the American City, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 215 (1968) ("the Douglas Commis-

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[19] HEIGHTS OF BUILDINGS COMMISSION, REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION TO THE COMMITTEE ON THE HEIGHT, SIZE AND ARRANGEMENT OF BUILDINGS OF THE BOARD OF ESTIMATE AND APPORTIONMENT OF THE CITY OF NEW YORK 68 (1913). The *Euclid* Court relied heavily on this and other reports of "commissions and experts" to reach its conclusions about the necessity and purpose of zoning (272 U.S. at 394). An informative account of the importance of these reports in the Court's consideration of *Euclid* is found in TOLL, ZONED AMERICAN (1969).

sion").[20] The denial of necessary zoning changes outside racial ghettos frequently makes zoning an instrument of "economic and racial exclusion" (Douglas Commission, pp. 18, 211-17) and is a key factor in concentrating these programs in already congested ghetto areas where they reinforce racial segregation.[21] Indeed Lansing's own City

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[20] The Douglas Commission undertook its study pursuant to a Congressional mandate, Pub. L. No. 89-117, §301 (1965), to inquire, *inter alia*, into the relationship between zoning and low rent housing. It observed:

> "Multifamily housing units generally provide the best opportunities for housing persons of low and moderate incomes. The rental nature of such housing, and the savings produced by spreading land costs over a greater number of units, place such housing within the means of many who could not afford new single-family houses. *Furthermore, many of the publicly assisted housing programs are multifamily programs and depend on the existence of zoning for multifamily structures." (Ibid.).*

[21] The Kerner Commission expressed deep concern about the restriction of federally assisted housing programs to ghetto areas:

> "To date, housing programs serving low-income groups have been concentrated in the ghettos. Non-ghetto areas, particularly suburbs, for the most part have steadfastly opposed low-income, rent supplement, or below-market interest rate housing and have successfully restricted use of these programs outside the ghetto" (p. 263).

The Douglas Commission has identified discrimination against the poor and racial minorities as a major part of this opposition to the nation's public housing program:

> "The opposition to public housing, based on a four-fold set of objections, has been strong almost from its beginning in this country. It is compounded of several elements: *(a)* a dislike of public activity in such an intimate family matter as housing; *(b)* the fear of undue government expenditures; *(c)* a desire to keep the poor physically at a distance; and *(d)* deep racial prejudices on the part of some whites. *The latter two deserve special attention.* They are evident almost everywhere in this country. Public housing is by definition and intent housing for the poor. About one-third of the urban poor are non-white, and more than half of the families in public housing are black. Thus these two major sources of opposition combine and fuse into a so far unyielding roadblock" (p. 129).

Planner acknowledges that zoning is part of a sophisticated system of government which locks blacks and Mexican-Americans into Lansing's ghetto (Tr. I, 143).

This Court has long been concerned with society's persistent efforts to build and maintain racial ghettos. It has barred racial zoning, *Buchanan* v. *Warley,* 245 U.S. 60 (1917); restrictive covenants, *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); public encouragement of private discrimination, *Reitman* v. *Mulkey,* 387 U.S. 369 (1967); and private racial discrimination itself, *Jones* v. *Mayer,* 392 U.S. 409 (1968). Now is an appropriate time to consider how established principles of law should guide public controls over the development of land to assure that these controls contribute to Congressional policy to make the promised end of racial ghettos a reality.

I.

The Court Below Failed to Apply the Due Process and Equal Protection Clauses of the Fourteenth Amendment in Accordance With Principles Established by This Court.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment require that the City of Lansing grant the zoning change necessary to build low rent housing at Jolly-Cedar. The Due Process Clause requires this result because the referendum effacing the zoning change would serve no legitimate governmental interest. The Equal Protection Clause requires the same result because obliterating the zoning change will, without serving a legitimate governmental interest, prevent poor blacks and Mexican-Americans from living outside a congested racial ghetto. These results are even clearer when the threatened denial of the zoning change is considered in light of the principle

that only compelling governmental interests may impinge on the constitutional rights involved here.

A. *Due Process.*

Zoning regulations are an exercise of the police power, *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. at 387, and must have "a substantial relation to the public health, safety, morals, or general welfare", *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928). The contemporary importance of this test is that its faithful and rigorous application would substantially prevent the use of zoning as a device for economic and racial exclusion by imposing a strict burden on those supporting exclusion to show that such exclusion advances a legitimate governmental interest.

Applying this test, the City Council after investigation and public hearing found that neighboring properties will not be adversely affected and that the zoning change is consistent with the intent and purpose of promoting public health, safety, morals and general welfare. The District Court determined that these findings were supported by "substantial facts" (6a), adopted them as the Court's own findings, the City did not contest them on appeal, and the Court of Appeals did not even consider them. Neighboring property owners objected to increased densities, but beyond concern with school capacity there is no suggestion that density is a problem. The concern with capacity was considered by city officials, and two new schools are being built. In fact the only sure consequence to neighborhood schools is that Jolly-Cedar will integrate them. All the evidence shows that Jolly-Cedar has been expressly and adequately planned to account for increased densities and that the park and community facilities which it will bring to the area will benefit not only residents of the project but the entire neighborhood as well. The objection to multiple

dwellings "per se" (the referendary petition was circulated by the "Committee for Individual Homes") is similarly unsupported by any suggestion that a single five story apartment house for the elderly poor located on a 20 acre parcel will deprive existing single family homes of sun or air, or create any density problems.[22] Without factually supportable and legitimate objections to increased densities zoning may not maintain low densities simply as an exclusionary device. *Christine Building Co.* v. *City of Troy,* 367 Mich. 508, 116 N.W. 2d 816 (1962); *Roll* v. *City of Troy,* 370 Mich. 94, 120 N.W.2d 804 (1963). As the Supreme Court of Pennsylvania recently said: "[T]he general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive or exclusionary." *National Land and Investment Co.,* v. *Kohn* 419 Pa. 504, 215 A.2d 597, 612 (1965).

B. *Equal Protection.*

The denial of the zoning change will specially victimize poor blacks and Mexican-Americans now confined to a ghetto created by discrimination and poverty. It will mean their continued subjection to discriminatory displacement by highways and publicly assisted industrial expansion, and their inability to enjoy the more ample municipal services provided outside the ghetto. It will mean that while racial minorities and the poor are crowded together and forced to live in the midst of great population densities, governmental power is used to prevent the development of housing in a low density white residential neighborhood which would relieve ghetto overcrowding. All this would neither serve a legitimate governmental interest, nor be part of a consistent governmental plan to maintain low

[22] This Court declined to rule two years after *Euclid* whether a zoning ordinance may exclude an apartment house for the elderly poor from a single family residence zone. *State of Washington ex rel. Seattle Trust Co.* v. *Roberge,* 278 U.S. 116, 123 (1928).

densities in southern Lansing. In the meanwhile, other zoning changes to provide housing typically beyond the financial means of ghetto residents at densities equal or greater than Jolly-Cedar have been approved and not been subjected to repeal by referendum.

These facts establish a denial of equal protection even without proof of discriminatory purpose and motivation. Whether the cause is arbitrariness, indifference, or deliberate hostility, the result of unequal treatment is constitutionally prohibited, as "it is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725 (1961). Nevertheless, the District Court's finding that the motivation behind the referendum is economic and racial discrimination, while not an essential element of petitioners' equal protection claim, strengthens this claim by illuminating the basic nature of the discrimination. The finding was adequately supported by testimony which the District Court heard directly and should not have been set aside by a reviewing court acting inappropriately as a trier of fact.

It is true the City Planner's testimony that the opposition to Jolly-Cedar is motivated by the efforts of present residents of the area to keep poor people out of their neighborhood, many of whom would be black, most directly implicates the economic discrimination of the project's opponents. But discrimination against the poor also violates the Fourteenth Amendment. *Douglas* v. *California,* 372 U.S. 353 (1963); *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). Moreover, it is often difficult to separate discrimination against the poor from racial discrimination. The City acknowledges the "strong relationship between race and poverty" (Stip. ¶ 10). To be black or Mexican-American in Lansing typically means to be poor as well.

C. *The Compelling Interest Test.*

We have described the test as whether the state action here involved serves a legitimate state interest because the record shows *no* legitimate state interest for denying the change, and this Court need not decide whether to apply the stricter test requiring a "*compelling* governmental interest" which applies when a classification or exercise of the police power impinges on constitutionally protected rights. *Shapiro* v. *Thompson*, 394 U.S. at 642 (concurring opinion). It is petitioners' view nevertheless that only a compelling governmental interest may justify denial of the zoning change needed to construct this housing development for the poor.

There are several important constitutional rights involved here. One is the right to be freed from vestiges of slavery. Lansing's ghetto, in which blacks and Mexican-Americans are "required to reside by virtue of their race, ethnic background, and poverty" (Stip. ¶ 7), is no less than "a relic of slavery." *Jones* v. *Mayer*, 392 U.S. 409, 441 (1968). Jolly-Cedar will provide some ghetto residents an opportunity to live outside this ghetto. It will also provide housing for ghetto residents who are being discriminatorily displaced by public projects and forced to move to substandard, segregated, costly, and overcrowded homes.[23] Jolly-Cedar will further enable ghetto children to attend integrated schools. For at least some poor black and Mexican-American migrants to Lansing (migration is a sig-

[23] The displacement of blacks by public projects and publicly supported private developments in situations where racial discrimination severely limits the availability of relocation housing deprives black displacees of the equal protection of the laws and requires responsible government agencies to take adequate steps to assure the availability of non-discriminatory replacement housing. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Arrington* v. *City of Fairfield*, 414 F.2d 687 (5th Cir. 1969).

nificant factor in the growth of Lansing's ghetto, Tr. I, 108), the significance of Jolly-Cedar is that their constitutional right to migrate, *Shapiro* v. *Thompson, supra*, will not result in consignment to a racial and economic ghetto upon arrival. The fulfillment of these constitutional imperatives—the eradication of badges of servitude, equal protection for blacks displaced by public projects, and integrated education, among others—should never be jeopardized by less than the most compelling of governmental interests. No such interests are present here to justify effacing the zoning change needed to construct Jolly-Cedar.

II.

The State Action Here Involved Would Frustrate the Federal Policy of Providing Low Rent Housing Outside Racial Ghettos and Violate the Supremacy Clause.

With increasing clarity the United States Department of Housing and Urban Development has formulated an important policy to govern the selection of sites for low rent housing and assure that federal housing programs are not used to perpetuate racial ghettos but rather serve to provide a realistic way for impoverished minorities to obtain housing outside such ghettos. The District Court held denial of the zoning change would frustrate the fulfillment of this policy in Lansing and violate the Supremacy Clause. The Court of Appeals reversed on the narrow ground that the specific formulation of this policy in HUD's Low Rent Housing Handbook which was issued pursuant to Title VI of the Civil Rights Act of 1964 "does not rise to the dignity of federal law" as it lacks Presidential approval pursuant to 42 U.S.C. §2000d-1, and also because the Court saw no conflict between the policy and the City Charter's provisions on initiative and referendum. These conclusions seriously undermine the effective administration of Acts of Congress

which require the federal government to act affirmatively and decisively to promote equal opportunity and should be reversed by this Court.

The objectives of HUD's site selection policy are to integrate public housing and provide racial minorities an opportunity to live outside racial ghettos (Low Rent Housing Handbook, RHA 7410.1, Chapter 1, Section 1(2)(g)). The policy is not inflexible and does not permit *some* public housing construction in ghetto areas. Nevertheless, its clear thrust is to require, as the City stipulated in the District Court, "that low rent housing sites be selected outside racial ghettos in order to foster residential integration" (Stip. ¶ 14).[24]

HUD's requirements deal explicitly with the issue of exclusionary zoning. Obviously responding to problems caused by discriminatory zoning practices which prevent construction of low rent housing outside racial ghettos, HUD requires a full explanation of the "underlying reasons" for the denial of necessary zoning changes in order to determine whether "the reasons are consistent with the nondiscrimination requirements of Title VI" (Low Rent Housing Handbook, *supra*). Through these requirements HUD firmly recognizes the interrelationship between zoning and the fulfillment of national policies to provide minorities a meaningful opportunity to live outside racial ghettos.

The stated authority for these requirements is the regulation issued by HUD and approved by the President delineating acts prohibited by Title VI of the Civil Rights Act of 1964. This regulation makes the "location" of pub-

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[24] In the absence of persistent and faithful application of this requirement remedial action by the federal courts may be necessary to undo the effects of discriminatory site selection policies. *See, Gautreaux* v. *Chicago Housing Authority*, 296 F.Supp. 907, 304 F.Supp. 736 (N.D. Ill. 1969).

licly assisted housing a critical factor in assuring equal housing opportunities and prohibits local actions in determining housing locations which "have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race, color, or national origin" (24 C.F.R. § 1.4(b)(2)). The City has not questioned the validity of HUD's interpretation of this regulation, and this Court shows "great deference" to the interpretation given a statute or regulation by the federal agency charged with its administration. *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 276 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Indeed the only court to decide this issue squarely held that the interpretation is valid. *Hicks* v. *Weaver*, 302 F.Supp. 619, 622 (E.D. La. 1969).

The Court of Appeals appears to have ruled that Title VI's requirement that "rules, regulations, or orders of general applicability" be approved by the President before they may become effective (42 U.S.C. §2000d-1) means no federal department may make binding interpretations of regulations so approved beyond using the exact words of the approved regulation. As the specific language of HUD's site selection policy in the Low Rent Housing Handbook has not received Presidential approval, the Court of Appeals dismissed the policy as a mere "guideline".

It is important for the effective administration of Title VI that the Department of Housing and Urban Development be able to interpret approved regulations and establish enforcement procedures in a manner consistent with such regulations without seeking Presidential approval for every interpretation and procedure. The Department of Health, Education and Welfare's school desegregation guidelines are similarly interpretations of approved regulations which have fulfilled an important role in effectuating

national policies against discrimination, and have been protected under the Supremacy Clause from hostile state action. *Alabama NAACP State Conference of Branches* v. Wallace, 269 F.Supp. 346 (M.D. Ala. 1967). The President has already determined that the "location" of publicly assisted housing may determine its racial character and effect its occupants in a way that Title VI prohibits. Beyond this the President should not be burdened with specifically delineating the procedures which local housing authorities should take to establish their compliance (e.g., reports showing the nonavailability of other sites, or the reasons for the denial of zoning changes), but rather HUD should have the flexibility to develop Title VI policies and procedures creatively within limits set up by the President's approved regulations.

Moreover, the Low Rent Housing Handbook is not a collection of "guidelines" but rather contains "permanent policies, procedures, and instructions" (Low Rent Housing Handbook, Transmittal Notice, §3) issued under HUD's rule making power (42 U.S.C. §1408). See *Thorpe* v. *Housing Authority of the City of Durham, supra* at 274.[25] Furthermore, HUD has an independent obligation under the Fair Housing Act of 1968 to administer all its programs in a manner which "affirmatively" furthers the national policy of fair housing (42 U.S.C. §3608(d)). While HUD has not gone through the formal motions of reissuing its site selection requirements as Fair Housing Act regulations, it clearly has the power to do so to assure that fed-

[25] As indicated earlier, *supra* fn. 1, HUD's Low Rent Housing Manual has been incorporated into the Handbook. The Low Rent Management Manual which was the subject of *Thorpe* has also been incorporated in the same Handbook. Just as the HUD requirement in *Thorpe* is clearly mandatory, so is the site selection requirement. The Court of Appeals' description of this requirement as "guidelines" is simply not correct.

eral programs are not used to build and maintain racial ghettos. Whether under Title VI, HUD's general ruling making power, or the affirmative action requirements of the Fair Housing Act of 1968, HUD's site selection requirements are valid federal law.

Petitioners recognize that Congress vested local governments with considerable power in administering public housing programs. The District Court fully respected this fact and observed "that although the federal government has the power to disregard local zoning laws, the requirement for good federal-community relations and proper administration of local programs requires due regard for long range plans and related development by the municipal government" (19a). The conflict between federal policy and the "application", *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 312 (1964), of Lansing's zoning ordinance arises only after a long series of local decisions. Duly constituted local bodies have seriously considered this zoning change, and after studies, reports, and public hearings, have approved the change in accordance with local ordinances. Now the zoning change is subject to repeal for no legitimate governmental reason but primarily to keep low income persons, many of whom would be black, out of a white residential neighborhood. At this point the deference to local decisions which is generally appropriate in these matters should end, and this Court should assure the effectuation of clear and important federal policies.

III.

The Use of a Municipal Referendum to Decide This Zoning Question Does Not Immunize the Underlying Decision From Judicial Scrutiny.

The basic issue is whether Lansing's zoning power may be used to frustrate federal policy and deny the constitutional rights of black and Mexican-American residents of Lansing's ghetto. The issue would be no different if without a referendum the City Council candidly admitted that it denied the zoning change without a legitimate governmental reason but rather to maintain oppressive conditions in Lansing's congested ghetto and give effect to the opposition of present property owners in the Jolly-Cedar area to the poor and racial minorities. If the City Council expressed itself with such candor no court would hesitate to strike its action down. Yet the Court of Appeals appears to hold that Lansing may achieve the same result through a referendum and be free of constitutional restraints.

Applicable decisions of this Court require a different result. The broad generalizations of the Court of Appeals that "if the electors had a legal right to a referendum, their motive in exercising that right would be immaterial" (32a) and that "initiative and referendum . . . being founded on neutral principles . . . should be exempt from Federal Court constraints" (33a), do not accord with this Court's holdings that a popular referendum does not immunize a locality's underlying decision from the requirements of the Constitution. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 (1964); *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969), *Reitman* v. *Mulkey*, 387 U.S. 369 (1967). The City of Lansing may at times be governed by a majority of voters in a referendum and at other times by a representative government. In either event, the Constitution requires that the City accord due process, equal protection, and respect the

supremacy of federal law. There is no way which the people of Lansing may allocate governmental power between themselves and their representatives to immunize governmental decisions from constitutional scrutiny.

Only two years after *Euclid* this Court ruled that due process is not abolished when a municipal government delegates its zoning power to others. The City of Seattle had amended its zoning ordinance to permit the construction of a multiple dwelling philanthropic home for the aged poor in a single family residential district providing that two-thirds of the owners of property within 400 feet of the proposed home consented. This Court ruled that the delegation of the zoning power to nearby property owners could not be sustained under the Due Process Clause because it allowed them to act "uncontrolled by any standard or rule prescribed by legislative action" and without standards "they are not bound by official duty, but are free to withhold consent for selfish reasons or arbitrarily. . . ." *State of Washington ex rel. Seattle Trust Co.* v. *Roberge,* 278 US. 116, 122 (1928). Neither should all the people of Lansing acting through a referendum have any right to act arbitrarily for the Constitution governs no matter who exercises the zoning power.

The District Court expressed the realistic fear that if the referendary device was free of constitutional constraint, then "it would be possible for racially motivated people to totally prevent implementation of the congressional policy of building low cost housing outside the ghettos of our cities in order to ease racial tension and secure a better life for many of our citizens. Such a potentiality to frustrate the federal constitutional and statutory policy cannot be tolerated" (19a). Only if it is made clear that all the voters acting together are bound by the Constitution in the same way as municipal officials are bound will there be any

assurance that land use controls will not be used unconstitutionally to impede important federal policies.

Finally it is proper to consider these issues prior to the actual conduct of the referendum. The District Court found that the mere conduct of the referendum will deepen racial hostility (24a). Every black and Mexican-American in Lansing will know that white Lansing is voting to decide whether racial minorities will be permitted to leave their ghetto and live with everyone else. While this may not be an independent ground for establishing the unconstitutionality of the referendum, it is a ground for considering the constitutionality of the referendum prior to subjecting the people of Lansing to an intense period of racial hostility. Moreover, the Court of Appeals, although it would prefer to wait until after the referendum, itself reached the ultimate issue and ruled that even if the referendum repeals the zoning change residents of Lansing's ghetto have no constitutional basis to object (32a). The issue is therefore ripe for consideration by this Court.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Preliminary Injunction

(July 24, 1968)

On July 10 and 11 a hearing was held on the question of whether a temporary injunction should issue restraining the officials of the City of Lansing from conducting a referendum on repeal of the Jolly-Cedar Community Unit Plan which has been previously approved by the City Council.

After due consideration of the testimony and arguments presented, and after studying the proposed findings of fact and conclusions of law helpfully prepared by both parties, this court is of the opinion that plaintiffs have raised a serious and substantial constitutional question. That question is whether the proposed referendum threatens to deprive plaintiffs of rights secured by the Thirteenth and Fourteenth Amendments to the Constitution of the United States, and by Congressional legislation implementing those rights.

This court has found that plaintiffs are of a class that would benefit from the project, and that therefore they have standing to bring this suit. The court has further found that if the referendum is successful, the federal housing program in the Lansing area will be seriously impeded, and that plaintiffs will suffer irreparable harm.

This case also raises the question of whether the proposed referendum will involve the City of Lansing in discrimination in violation of the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1964, 42 U.S.C. §§1982 and 2000d. See Reitman v. Mulkey, 387 U.S. 369, 18 L.Ed. 2d 830, 87 S.Ct. 1627 (1967).

Since questions of illegal state and individual discrimination have been raised, a hearing on the merits must

be held to resolve these issues. The referendum must be enjoined pending resolution of these issues.

THEREFORE, IT IS ORDERED THAT the City of Lansing, Max E. Murningham, Mayor of the City of Lansing, Theo Fulton, Clerk of the City of Lansing, their agents, servants, employees, and attorneys, and all persons in active concert and participation with them be and hereby are enjoined from conducting or permitting to be conducted on August 6, 1968, or at any time prior to further order of this court, a referendum seeking repeal of the variance granted for construction of low-cost housing on the Jolly-Cedar site according to the Community Unit Plan.

At a date to be announced a full hearing will be conducted on all the issues properly raised by plaintiffs' complaint.

IT IS SO ORDERED.

/s/ NOEL P. FOX
District Judge

Opinion of District Court

(Read from the Bench November 15, 1968 and Filed formally January 8, 1969)

This case arises under facts which have been stipulated by the parties. These stipulated facts are hereby incorporated, in their entirety, into this opinion. The court finds the following facts to be especially pertinent and persuasive.[1]

This action is brought to redress a denial of rights secured by the supremacy clause and the thirteenth and fourteenth amendments to the United States Constitution; the Civil Rights Act of 1866, 42 USC §§1982-83; The Housing Act of 1937, as amended, 42 USC §1401, et seq.; Title VI of the Civil Rights Act of 1964, 42 USC §2000d; the Fair Housing Act of 1968, 42 USC §3601, et seq. (July 1968 Supp.); Demonstration Cities and Metropolitan Development Act of 1966. 42 USC §3301, et seq.; and Regulations of the United States Department of Housing and Urban Development, particularly Title 24 C.F.R. §1.4(b) 2(2), and §205.1(g) of the Department's Low Rent Housing Manual. It is also an action for declaratory judgment under 28 USC §2201.

Jurisdiction is proper in this court pursuant to Title 28 USC, Sections 1343(3) and (4), and 1331(a). This is a class action brought pursuant to sections (a) and (b)(2) to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs are fair and proper representatives of the class which they represent, the Black and Mexican-Americans of low income status in the Lansing area.

It is first important to note the conditions under which these groups live in the Lansing area.[2] Although only

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[1] The footnotes to these facts are taken from those studies underlying the facts, and are included to provide a better understanding of their meaning.

[2] The statistics which follow are taken in large part from defendants' own studies and submitted requests for funds to federal agencies. See especially plaintiffs' exhibits 4, 5, 6 and 7.

slightly more than 10% of the Lansing residents are Black and Mexican-American, approximately 65% of these two groups are concentrated in a ghetto containing only 11% of Lansing's total population. One large section of this area is 91% black; 75% of the housing is substandard or dilapidated; one-third of the housing is overcrowded; infant mortality rates are 50% greater in the ghetto; and the incidence of tuberculosis, heart disease, venereal disease, chronic arthritis and rheumatism, poor vision and hearing, poor dental care, malnutrition, mental illness, and chronic alcoholism are also higher than elsewhere in the city—yet the level of municipal services necessary to alleviate these conditions is lower in the ghetto than elsewhere in the city.

The existence of the ghetto has also resulted in de facto segregation in three schools which have over 80% black enrollments.

This ghetto has been created by discrimination and poverty. Since 90% of all low income housing in Lansing is located in the ghetto, and since there is a strong relationship between race and poverty, the access of Lansing's Black and Mexican-Americans to housing outside the ghetto is extremely limited. As a result, most of the southern area of Lansing, the location of the proposed Jolly-Cedar project, is almost exclusively white.

Public and private actions have greatly aggravated the shortage of housing available to these low income groups. Substantial displacement of low income persons from their homes has occurred due to interstate highways being routed primarily through Black and Mexican-American neighborhoods. Additional displacement is being caused by expansion of the State of Michigan administrative office complex. Industrial expansion has also displaced many members of the groups represented by the plaintiffs.

Although less than 15% of Lansing's population is Black and Mexican-American, it represents over 50% of the persons displaced. The City of Lansing was extensively used zoning variances and building permits to allow this displacement.

In response to these problems, the City of Lansing has begun working with the Department of Housing and Urban Development (HUD) in building housing for these displaced minority groups. As a result of the City's showing of a substantial need for low rent housing, HUD issued a program reservation to Lansing for 1,000 units, a statement of determination by HUD to finance the construction of these housing units. This commitment remains in effect.[3]

Working through the Lansing Housing Commission, the City of Lansing and HUD selected Jolly-Cedar, a twenty-acre parcel located in a white neighborhood in the southern portion of the City, as one of the sites. A major factor in site selection was compliance with Title VI of the Civil Rights Act of 1964, 42 USC §2000d, and Regulations of HUD pursuant to Title VI, particularly 24 C.F.R. §1.4(b) and §205.1(g) of the HUD Low Rent Housing Manual (Exhibit 1), which require that sites be selected outside areas of racial concentration. There were also other reasons for selection of Jolly-Cedar: children of Black and Mexican-American families would be able to attend predominantly white schools; the site would provide easy access to employment opportunities, transportation, shopping and

[3] A letter from Robert C. Weaver, Secretary of HUD, to Michael Davidson, attorney for Plaintiffs, dated May 24, 1968, states:

> "Our Chicago Regional Office reports that they have assigned a high priority for development of the various low-rent programs in Lansing for which reservations have been issued. At the present time, no action is being contemplated to cancel or otherwise alter the program reservation for this project."

health facilities; and most future development would occur in this part of the city.

The site was inspected and approved by the Michigan Civil Rights Commission and by the United States Department of Housing and Urban Development.

It was decided to develop the site through the turnkey program of HUD, which enables faster and less expensive development of new low rent housing by more fully utilizing the resources of private industry. The site was zoned for single family residences, which require lot areas of not less than 5,000 square feet per family. It was necessary to change the zoning to community unit plan in order to allow multiple family units.

After extensive investigation, a public hearing, and study by the Planning Board of the City of Lansing, both the Planning Board and the City Council decided that the property adjacent to the proposed development would not be adversely affected, that the proposed development would have a minimal effect on abutting properties, and that the plan would be consistent with the intent and purpose of public health, safety, morals, and general welfare. For these reasons, the necessary zoning change was approved by the City Council.

We find that these hearings were conducted according to due process and that the conclusions reached therein were supported by substantial facts and are therefore adopted by this court.

Numerous other zoning variances have been granted pursuant to the same community unit plan under which Mr. Schaffer, the private developer in this case, applied. None of these community plans has been subject to referendum. They have, however, with few exceptions, been plans which have provided for people of middle and upper incomes who

are able to rent at prices beyond the means of the residents of Lansing's ghetto.

Following the zoning change, a referendum petition was presented to the City Clerk in June of 1967, by an organization known as the Committee for Individual Homes, calling for the repeal of the ordinance enacting the zoning change. The Ingham County Circuit Court and the Michigan Court of Appeals ordered Lansing to conduct the referendum, but considered no issues of federal constitutional or statutory law. It is this referendum and these issues which are now before the court.

In addition to the stipulated facts, testimony at the hearing has persuaded the court to make the following additional findings of fact.

The proposed Jolly-Cedar site is the only new site mentioned which conforms to the requirements of both HUD and the City of Lansing. Consistent with the apparent trend, the Jolly-Cedar site is located in the second ward of the City, the only ward which does not at the present time have facilities for low income housing.

The City has suggested eleven alternative sites should this referendum be allowed and succeed. Of those eleven sites, only four are in the second ward, which is the location consistent with the City's policy mentioned above. Of those four, only one is of comparable size. That alternative, however, is partially wooded, has extreme topography requiring extensive grading, is designated park or recreation in the City's master planning, and would also require a zoning change to allow the building of low income housing. Of the alternative sites in other wards, the only proposed site of comparable size is now occupied by a National Guard Armory, and would also require a zoning change.[4]

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[4] These facts are derived from an analysis of plaintiffs' Exhibits 21A-21G.

These facts indicate, first, that the Jolly-Cedar site is by far the best alternative, and, second, that the use of any other comparable site would require a substantial delay. And even after that delay, should this court allow a referendum to be held on this matter, a referendum might also be held on any other proposed site. In this way all possible sites could be eliminated, leaving the displaced Black and Mexican minority groups with nowhere to go.

The testimony of sociologists and educational psychologists indicates that the persistent pattern of discrimination used against Black and Mexican-Americans results in poor quality education, has a detrimental impact on self-confidence, and is likely to decrease motivation and increase crime.[5]

Many badges of slavery have been carried over into modern society: the existence of the ghetto, destruction of family patterns, and a feeling of inferiority are prime examples. The experience of the disadvantaged minority groups in Lansing's ghetto has been consistent with these general conclusions concerning discrimination throughout the nation.[6]

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[5] All the experts who testified agreed to this fact and supplemented it. The sources of their testimony provide further detail and enlighten the uninformed as to conditions in the ghetto and the effects thereof. See The Negro American (T. Parsons and K. Clark, eds., 1966), especially Drake, The Social and Economic Status of the Negro in the United States; T. Pettigrew, A Profile of the Negro American (1964), especially Chapter 1; Racial and Ethnic Relations (B. Segal, ed., 1966), especially Simmons, The Mutual Images and Expectations of Anglo-Americans and Mexican-Americans.

[6] Lansing's applications for federal housing monies (Plaintiffs' Exhibit H-7) have emphasized that Lansing's problems are similar to those described in the Report of the National Advisory Commission on Civil Disorders, March 1, 1968 (U.S. Gov't. Printing Office ed.) (hereinafter called Kerner Report). See also the transcript of the hearing for preliminary injunction (hereinafter called Preliminary Transcript), page 124.

Zoning ordinances have long been used to contain particular racial groups inside the ghetto.[7] This has been true in school zoning as well as property zoning.[8] Improvement

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[7] Testimony of Dr. Norman Goldner, sociologist specializing in race relations, Preliminary Transcript, at page 192. See also the materials on which Dr. Goldner's testimony was based in part: G. Myrdal, An American Dilemma (1944), at pages 600, 601, and 617; J. Vander Zanden, American Minority Relations (2d ed. 1963) at page 216.

The use of this sophisticated discriminatory device has also been prominent in the Lansing area, as the testimony of Raymond Guernsey, Planner for the City of Lansing, indicates at Preliminary Transcript, 142-143:

"Q. Well, what you are saying is that these people are locked into the City of Lansing. Right?

"A. Yes.

"Q. Black persons, Mexican Americans, they can't go outside of Lansing right now, can they?

"A. I believe they'd have difficulty obtaining housing outside the City of Lansing. For example, the City of Lansing had an area which it annexed by resolution to a golf course. It was not contiguous, coterminous, with city boundaries. We were discussing the possibility of a housing project on that site. It was in a different school district, in a different residential area, not part of our corporate seat so far as the grouping around it, but it was annexed to the city in just the area of the golf course, and it was near what we call our corporate limits.

The people in the area around it attacked the City on a legal action basis some ten years later, saying it was not properly part of the corporate City of Lansing. We were not successful in court, and they had the area withdrawn from the corporate limits of the City of Lansing and subjected it to their own zoning and code controls.

"Q. *So what you got is zoning also acting as a factor in locking in these groups into the inner city of the City of Lansing?*

"A. *The entire system, sophisticated system of government is involved here, yes. The Model Cities application attempted to attack this.*" (Emphasis supplied.)

[8] Testimony of Professors James B. McKee and Robert L. Green.

in national housing patterns is also inhibited by old zoning requirements which are often used as tools to resist change.[9]

It is critically important to classify these zoning practices for what they are: sophisticated means of invidious racial discrimination; invidious because racial discrimination is difficult to prove in this otherwise acceptable means of city planning.[10]

The Black community in Lansing perceives a vote on this referendum to be a vote on whether Black Americans have equal rights as citizens—rights which are not subject to diminution by the state or by individual citizens.[11]

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[9] *Ibid.*

[10] Charles Abrams in a paper entitled The Housing Problem and the Negro printed in The Negro American, *supra*, note (5), at page 516 traces the history of this invidious use of zoning:

> "As opposition crystallized, racial zoning became the main device to keep the Negro in his place and, when the courts struck it down as unconstitutional, the restrictive covenant was thereafter written into deeds in the effort to maintain white supremacy in neighborhoods. About 80 per cent of the vacant land in Los Angeles was at one time covered by such covenants. When the courts held racial covenants unenforceable, subtler devices were ushered in, including overrigid zoning ordinances sternly enforced against Negroes but relaxed for whites. Condemnation for incinerator dumps or other public works is another current device, while building inspectors and other petty officials are always on hand to harass the Negro who ventures where he is not wanted. When, for example, a private builder announced he would sell a few of his houses to Negroes in Deerfield, Illinois, his site was promptly condemned for a park. When the Ford Motor Company moved its plant from Richmond, California, to Milpitas, and when the union tried to build houses for its Negro workers, the area was promptly rezoned for industrial use. Thereafter came a sudden strengthening of building regulations, followed by a hike of sewer connection costs to a ransom figure."

[11] Testimony of Professor Robert L. Green.

The court further finds as a matter of fact that the motivation behind circulation of the referendum petitions and the attempts to hold the referendum for denying the zoning variance is in major part based on economic and racial discrimination in housing. This finding is grounded in part upon the uncontroverted testimony of the Planner for the City of Lansing at the hearing on the preliminary injunction, July 10 through July 12, 1968:

> "Q. * * * [I]t was your opinion that the purpose for this referendum for defeating this Community Unit Plan project was because these people did not want low-income families in their neighborhoods, many of whom would be black, isn't that correct?
>
> "A. My personal opinion is that answer is quite accurate." (Preliminary Transcript, at 239-40.)

This opinion of the City Planner was not based on speculation, but on his attendance at "all the public hearings on the subject proposal. . . ." Preliminary transcript at 157.

That the referendum was in large part racially motivated is corroborated by the testimony of Dr. Goldner, who stated that in his opinion in a case such as this, the motivation of the middle class whites would be to exclude "black and poor people" from the neighborhood.[12]

This finding of fact is also based upon the knowledge that similar zoning variances have often been used in Lansing to allow the construction of community unit housing for middle and upper income groups, with No opposition from the public.[13]

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[12] Preliminary Transcript, 186-188, 199.
[13] Stipulation of Facts, No. 22.

One final point should be disposed of in this regard. It was suggested in arguments (although no evidence was introduced to substantiate the point) that the objection to the housing was not racial, but related to density of population. The facts introduced simply do not permit the court to reach that conclusion.

In the first place, the one-family zoning which the referendum circulators favor limits density to 5,000 square feet per family,[14] or 8.7 families per acre. Yet the density of the Jolly-Cedar project is stipulated to be only 8.05 families per acre[15]—less than the maximum density allowed under the present zoning.

Furthermore, City Planner Raymond Guernsey rebutted any claim that density was the primary motivating factor behind this referendum:

> "Q. And this is the only one [multiple unit project] which has ever been subject to a referendum or vote. This is a stipulated fact. Is that your understanding as well?
>
> "A. Since I have been with the City, it is the first I have knowledge of.
>
> "Q. As City Planner for the City of Lansing and a member of the Board or employee of the Board, is that right, which approved this particular Community Unit Plan, can you describe any reason for this unique phenomena?
>
> "A. Having attended all the public hearings on the subject proposal, I would gather the residents in the area surrounding this particular project were opposed to those of low income being moved into the area.

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[14] Section 36-44(5), Code of the City of Lansing (1966).

[15] Stipulation of Facts, No. 20.

"Q. Many of whom . . . were very likely to be black people—right?

"A. Yes, we would assume that portion of the population would be Negro." Preliminary Transcript 156-7.

Thus, almost all of the evidence before the court supports the same conclusion: this referendum is in substantial part racially motivated.

The City of Lansing by its participation in and conduct of a referendum with this motivation, and with the aforementioned connotation in the mind of the public, would be a full partner in this private discrimination.

The Black members of the Lansing ghetto are not the only victims of racial discrimination. At present, because of the economic, social and cultural disadvantages of Mexican-Americans in the Lansing area, as well as their darker complexion, they *also* are the victims of racial discrimination within the meaning of the thirteenth amendment.[16]

Legal Issues

The parties would agree and we may assume that the citizens of Lansing have the requisite power to zone, whether it be through ordinance of the City Council or through referendum. The question before the court is whether the exercise of that power in this particular case deprives the plaintiffs of rights secured by the United States Constitution and the federal statutes enacted thereunder. If it does, the referendum may not be held, for it

[16] Testimony of Professors James B. McKee and Robert L. Green. See also Mydral, *supra*, note (8), at 53.

would be in violation of the supremacy clause of the United States Constitution, article VI, clause 2.

There appear to be two theories under which the plaintiffs may prevail in this case. The first is that the Jolly-Cedar project is a duly approved and funded federal housing project authorized by Acts of Congress enacted pursuant to constitutional provisions. According to this theory the action by the City of Lansing threatens the accomplishment of this project, thus depriving plaintiffs, who are potential applicants for residence in the Jolly-Cedar development, of rights and benefits conferred on them by an act of Congress implementing the thirteenth and fourteenth amendments.

The second theory is that the action of the residents who initiated the referendary petitions was motivated by racial prejudice. The City in putting the referendum on the ballot, would thereby be involved in private discrimination in violation of the thirteenth amendment and the equal protection clause of the fourteenth amendment of the United States Constitution; section 1 of the Civil Rights Act of 1866, 42 USC §1982; Title VI of the Civil Rights Act of 1964, 42 USC §2000d; and the Supreme Court doctrine set forth in Reitman v. Mulkey, 387 U.S. 369 (1967). Acceptance of either theory would require a decision in favor of plaintiffs.

We first consider the supremacy clause theory. There is little doubt that the Jolly-Cedar development is in large measure a product of the federal housing program. While development under the turnkey program is not directly controlled by the federal government, that program is a significant part of the congressional attempt to provide adequate housing for disadvantaged persons, many of

whom are members of minority groups. One of the main reasons behind the selection of the Jolly-Cedar site was the federal policy to encourage the development of low rent housing outside areas of racial concentration.

The Kerner Commission Report recommended that the major thrust in low cost housing should be made in nonghetto areas:

> "Enactment of a national fair housing law will eliminate the most obvious barrier limiting the areas in which nonwhites live, but it will not deal with an equally impenetrable barrier, the unavailability of low and moderate income housing in nonghetto areas.
>
> "To date, housing programs serving low-income groups have been concentrated in the ghettos. Nonghetto areas, particularly suburbs, have for the most part have [sic] steadfastly opposed low-income, rent supplement, or below-market interest rate housing, and have successfully restricted use of these programs outside the ghetto.
>
> "We believe that federally aided low- and moderate-income housing programs must be reoriented so that the major thrust is in nonghetto areas. Public housing programs should emphasize scattered site construction, rent supplements should, wherever possible, be used in nonghetto areas, and an intensive effort should be made to recruit below-market interest rate sponsors willing to build outside the ghettos.
>
> "The reorientation of these programs is particularly critical in light of our recommendation that 6 million low and middle-income housing units be made available over the next 5 years. If the effort is not to be counterproductive, its main thrust must be in non-

ghetto areas, particularly those outside the central city." [17]

Paragraph 4g of the Department of Housing and Urban Development's Low-Rent Housing Manual, Section 205.1, states:

> "* * * The aim of a Local Authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed, or national origin, thereby affording members of minority groups an opportunity to locate outside of areas of concentration of their own minority group. Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration."

It is obvious that the proposed referendum in this case, if passed, would seriously impede this federal policy.

The reasoning behind the above policy is similar to that used by Congress in enacting the Civil Rights Act of 1866, including 42 USC §1982; the Civil Rights Act of 1964, 42 USC §2000d; and the Fair Housing Act of 1968, 42 USC §3601, et seq. (July 1968 Supp.). The policy behind these statutes, simply stated, is to erase the effects of racial discrimination from society.

The thirteenth amendment not only abolished slavery, it also gave Congress the authority to adopt legislation

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[17] Kerner Report 263. The City of Lansing emphasized the findings of the Kerner Report in its application for federal housing funds. Preliminary Transcript at 124.

which would terminate the vestiges of slavery which so tenaciously cling to the body and horrendously permeate the soul of our society.

This idea was first, and perhaps most eloquently enunciated by Mr. Justice Harlan dissenting in the Civil Rights Cases, 109 U.S. 3, 35:

> "That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights Act of 1866."

Harlan's dissenting position became the majority view in Jones v. Mayer, Co., 392 U. S. 409 (1968). The Supreme Court there held that the thirteenth amendment gave Congress the power to enact the Civil Rights Act of 1866 and that Section 1 of that Act, currently 42 USC §1982, bars all racial discrimination in the sale or rental of property, real or personal. Justice Potter Stewart, speaking for the Supreme Court in the Jones case, decided in June of 1968, said:

> "'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.' *Civil Rights Cases,* 109 U.S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that

> clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery* in the United States.' *Ibid.* (Emphasis added.)" 392 U.S. at 439.

One of the badges of slavery that surely remains and must be eradicted is the crowding of minority groups into the ghettos of our cities. In the Jones case, supra, Justice Stewart further said:

> "Just as the Black Codes, enacted after the Civil War . . . were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." 392 U.S. at 441.

The present case arises as a result of a congressional attempt to erase that remnant of slavery.

Article VI, clause 2, of the United States Constitution provides that the Constitution and all laws enacted pursuant thereto shall be the supreme law of the land. An action approved by the entire electorate of the State of Michigan could not serve to nullify rights created by or arising out of the United States Constitution. There is little doubt that the action by the City of Lansing in this case conducting this racial referendum would deprive plaintiffs of fundamental constitutionally secured rights and would serve only those forces of discrimination which seek to frustrate the aforementioned constitutionally declared policy. Because of the supremacy clause of the Constitution, that action is impermissible.

Defendants claim, however, that because the federal government, in administering the turnkey program, recognizes the necessity of working within the zoning regulations of local communities, the power of the City of Lansing to zone has not been abrogated. We do not disagree with this argument, for it is obvious that although the federal government has the power to disregard local zoning laws, the requirement for good federal-community relations and proper administration of local programs requires due regard for long range plans and related development by the municipal government.

However, more is involved here than the mere power to zone. Up to this point in time the federal government and the private developer have proceeded with due regard for local zoning and development plans. The City Council granted a zoning change for the Jolly-Cedar site only after a full hearing by the Planning Board and an appropriate recommendation from the Board to the Council.

We may assume that the project as proposed is compatible with, and even in furtherance of, long range plans of the City of Lansing. We find that the federal government has fully complied with its self-imposed obligation to work within the framework of local plans. However, the proposed referendum at this point unduly impedes implementation of federal policy under the supremacy clause and must be enjoined.

If referenda of this type were consistently permitted, it would be possible for racially motivated people to totally prevent implementation of the congressional policy of building low cost housing outside the ghettos of our cities in order to ease racial tension and secure a better life for many of our citizens. Such a potentiality to frustrate the federal constitutional and statutory policy cannot be tolerated.

Plaintiffs' second theory is that the conducting of this referendum makes the City of Lansing a partner in discrimination in violation of the Constitution.

It should first be emphasized that the overwhelming weight of the evidence has caused this court to find that racial discrimination was a primary motivation behind this referendum.

In Reitman v. Mulkey, 387 U.S. 369, the Supreme Court held that the adoption of an anti-open housing provision in the California State Constitution by an initiatory referendum was an action of discrimination in violation of the equal protection clause of the fourteenth amendment. The Court affirmed the California Supreme Court in holding that the California constitutional provision (Section 26), ". . . was legislative action 'which authorized private discrimination' and made the State 'at least a partner in the instant act of discrimination . . . .'" 387 U.S. at 375, 18 L.Ed. 2d at 835. The court then said at 387 U.S. 378, 18 L.Ed. 2d 836:

> "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations. 'Only by sifting facts and weighing circumstances' on a case-by-case basis can a 'nonobvious involvement of the State in private conduct be attributed its true significance.' Burton v. Wilmington Parking Authority, 365 U.S. 715, 722. . . ."

In his concurring opinion in the Reitman case, Mr. Justice Douglas saw the problem as being "in the realm of zoning, similar to the one we had in Shelley v. Kraemer, 334 U.S. 1." The Court there held that restrictive covenants

were invalid as an attempt to privately zone against Black people. Where, as in this case, the zoning is motivated by the same factors of racial prejudice, but is carried out under the auspices of the state, the action must be even that much more invalid. In Reitman, Justice Douglas said:

> "Zoning is a state and municipal function. See Euclid v. Ambler Co., 272 U.S. 365, 389, et seq., 71 L.Ed. 303, 311, 47 S.Ct. 114, 54 ALR 1016; Berman v. Parker, 348 U.S. 26, 34-35, 99 L.Ed. 27, 38, 39, 75 S.Ct. 98. When the State leaves that function to private agencies or institutions which are licensees and which practice racial discrimination and zone our cities into white and black belts or white and black ghettos, it suffers a governmental function to be performed under private auspices in a way the State itself may not act." 387 U.S. at 384.

It would stretch credulity to conclude that the referendum here is not motivated by racial factors. In Otey v. Common Council, 281 F.Supp. 264 (E.D. Wisc. 1968), the district court was faced with the task of determining whether a proposed resolution before the Milwaukee Common Council, to the effect that the body should not enact any ordinance restricting the right of owners to sell or lease private realty, violated the fourteenth amendment. The court considered evidence of racial discrimination and found that:

> "The record, including not only the testimony of witnesses but also evidence of the housing patterns existing in the City, reveals that economics is not a determining factor when Negroes attempt to relocate their homes. Race is a factor of almost transcendent significance and Negro home buyers or lessees wishing

> to leave the inner city are faced with barriers of discrimination which few have been able to overcome. When housing outside the inner city is sought, attributes otherwise crucial in choosing buyers and tenants, such as ability to pay, educational background, demeanor, reliability and stability, are not even investigated by sellers and landlords after the color of the applicant is discovered. Although other excuses may be and are given, it is clear that racial discrimination on the part of sellers and landlords or those whose opinions influence their actions is responsible for the Negroes' inability, except in rare instances, to leave the inner city." 281 F.Supp. at 270.

The same finding applies to the case at bar, and was supported by substantial first-hand as well as expert testimony.

As in Reitman, the Otey court found that adoption of the resolution would be a public act in support of private discrimination, and hence violative of the equal protection clause of the fourteenth amendment.

Taking the test set forth in the Reitman case, supra, this court with knowledge of the facts and circumstances in this case, and of the practical potential impact of the referendum, which calls for a vote on the constitutional rights of plaintiffs to protection from discrimination in securing private housing, and its familiarity with the manner in which the referendum would operate to harm them, holds that the referendum would involve the state in private racial discrimination to an unconstitutional degree.

Since the decision in Reitman, similar cases have been decided by other lower federal courts. The most relevant cases are Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968); Holmes v. Leadbetter, E.D. Mich., No. 31,343, Aug. 16, 1968; Otey v. Common Council, supra.

In all three of these cases, the proposed referendum dealt with open housing. In Otey and Holmes, the federal district courts held that the conducting of such referendum would be unconstitutional. In Spaulding, the Forth Circuit held that a referendum on open housing was merely a neutral act, since it would not create a state constitutional right to discriminate.

The case at bar is distinguishable from Spaulding. First, this case deals with federal involvement and thus the supremacy clause becomes a consideration not raised in any of the other cases. Second, no finding of racial motivation or discriminatory effect was made in Spaulding.[18] In this case, both the racial motivation and discriminatory effect have been specifically found to be established facts.

These are not distinctions without a difference, for they illustrate the two basic and independent points on which this decision stands: federal pre-emption and municipal furtherance of discrimination.

This court does not hold that the plaintiffs in this case, and others similarly situated, have a constitutional right to low cost housing. All that we decide is that when the federal government exercises its constitutional authority to provide for the welfare of its citizens and erase the vestiges of slavery that remain in this society, the object of that governmental action may not be deprived of its intended benefits by means of discriminatory tactics on the local level.

Although federal civil rights statutes are couched in declaratory terms and provide no explicit method of enforcement, federal courts are not powerless to act. In such a case, the district court is encouraged by the Supreme

[18] This factor also distinguishes Spaulding from Otey and Holmes.

Court to fashion an effective, equitable remedy equal to the needs of the case. The circumstances of this case, as in Otey and Holmes, indicate the need for the issuance of a permanent injunction.

There is no doubt that plaintiffs will suffer irreparable harm if a permanent injunction is not issued. The effect of any further delay is perhaps best stated by the defendant City of Lansing in its answer to the previous petition for mandamus before the State Circuit Court in Ingham County:

> "A crisis situation in housing for low income families exists in the City of Lansing. This is so widely known throughout the community as to be a proper subject for judicial notice, shown by the exhibits attached to the Motion for Intervention.
>
> * * *
>
> "In order to help meet this critical need for housing for persons of low income in the City of Lansing, the City has established and is diligently pursuing a program of public housing for low income families. * * *
>
> *"Because of said need for low income housing, any and every delay in the development and completion of the above-described housing project will cause needless suffering and want in the City of Lansing among persons of low income and will substantially contribute to those conditions which breed and encourage hatred, civil disobedience and public violence in the city."* (Emphasis supplied.) Preliminary Transcript, 26-28, quoting P. 5, § XII of the City of Lansing's answer to the Ingham County action.

It has been established that the mere holding of the referendum would serve to deepen the mistrust and increase the violence between the races.

It is imperative to relieve the human suffering and deprivation which will remain and increase as long as plaintiffs and others similarly situated remain living in substandard housing. Each day that the children of plaintiffs remain under these stifling conditions lessens their chances of eventually leading healthy and productive lives.

For all of the above reasons, it is hereby ordered that the injunction prayed for in plaintiffs' complaint be and hereby is granted.

Dated: January 8, 1969.

/s/ NOEL P. FOX
District Judge

Judgment of District Court

(November 29, 1968)

This action having come on for hearing before the Court, and the issues having been duly heard and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED:

1. The City of Lansing, Max E. Murninghan, Mayor of the City of Lansing, Theo Fulton, Clerk of the City of Lansing, their agents, servants, employees, and attorneys, and all persons in active concert and participation with them be and hereby are permanently enjoined from conducting or permitting to be conducted a referendum in respect to the rezoning of property located at the 100 and 200 blocks of East Jolly Road, in the City of Lansing, popularly known as Jolly-Cedar, from "A" One Family Residence District to Community Unit Plan.

2. The City of Lansing, Max E. Murninghan, Mayor, Theo Fulton, Clerk, their agents, servants and employees be and are hereby ordered to process the plans for the construction of low rent housing on the Jolly-Cedar site, in compliance with local ordinances and regulations, pursuant to the Community Unit Plan approved by the City Council of the City of Lansing on May 8, 1967, according to the application of the private developer.

/s/ NOEL P. FOX
United States District Judge

Opinion of Court of Appeals

(October 28, 1969)

Before: WEICK and PECK, Circuit Judges, and MACHROWICZ, District Judge.*

PER CURIAM. The suit was brought in the District Court by poor black and Mexican-Americans to enjoin a referendum on a "spot" zoning ordinance enacted by the Council of the City of Lansing, which ordinance rezoned a twenty-acre site at Jolly and Cedar Streets in a white neighborhood in said City, from a zoning classification of "A" One Family Residential district to a community unit plan which would consist of one hundred low rent town-house units and a low rent five-story apartment building containing one hundred fifty units for the elderly.

The rezoning had been applied for by a private developer who had been selected by the Lansing Housing Commission to build the units with funds supplied by the United States Department of Housing and Urban Development (HUD). The rezoning ordinance was not of general application. It provided only a "spot" zoning variance from the general zoning classification.

The City Council granted the application of the developer and passed the spot zoning ordinance. In the approved plans for the project the density of the housing for low income families was 8.05 families per acre. The housing for the elderly raised density for the development above the average density allowed in single-family districts.

Acting under the Charter of the City of Lansing, an organization known as Committee For Individual Homes circulated a referendum petition on the spot rezoning ordi-

* Honorable Thaddeus M. Machrowicz, Judge of United States District Court for the Eastern District of Michigan, sitting by designation.

nance. The petition was signed by more than 15% of the electors of the city and was presented to the City Clerk, but he refused to accept it.

A mandamus action was brought against the City Clerk, the City Council and the City of Lansing in the Circuit Court of Ingham County, Michigan, to compel them to process the petition in accordance with the Charter provisions. The Circuit Court, after hearing, issued its writ of mandamus. The case was appealed to the Michigan Court of Appeals which affirmed the decision of the Circuit Court. *Parr* v. *Fulton*, 9 Mich. App. 719, 158 N.W.2d 35 (1968).

The City Council then determined to submit the proposal to the electorate and scheduled the election for August 6, 1968.

Upon the filing of the present action in the District Court, the Court granted a preliminary injunction restraining the City from conducting the election, and later made it permanent. *Ranjel* v. *City of Lansing*, 293 F.Supp. 301 (D.C. W.D. Mich. 1969). The defendants appealed to this Court. We reverse.

A goodly portion of the opinion of the District Court was devoted to a vivid portrayal of the tragic conditions affecting the poor black and Mexican-Americans living in the slum areas in Lansing, and the need to alleviate these conditions by moving them out of the slums to more desirable neighborhoods. These conditions, however, concerning the plight of the poor, were not peculiar to Lansing nor indeed to the United States, but have existed for centuries in many places throughout the world.

It would seem to us that there should be a better way to achieve this worthy goal without enjoining an election and thereby depriving the citizens of a community of their right of suffrage.

The District Judge based his decision on two grounds, (1) the Supremacy Clause of the Constitution, and (2) his finding that the motivation behind the circulation of the referendum petition was in part racial and that the rights of the plaintiffs under the Thirteenth and Fourteenth Amendments were thereby violated.

THE SUPREMACY CLAUSE

The Supremacy Clause of the Constitution is applicable only when a state law conflicts with a valid federal law, and in such event the latter controls. *Free* v. *Bland*, 369 U.S. 663 (1962).

The District Court relied on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and Regulations of HUD pursuant thereto, particularly 24 C.F.R. §§ 1.4(b) and 205.1 (g) of HUD's Low Rent Housing Manual, as requiring "that sites be selected outside areas of racial concentration." We find no such provision in Title VI of the Civil Rights Act of 1964. § 2000d-1 of the Act does enable Federal Departments extending federal financial assistance to issue rules, regulations or orders of general applicability, which shall not become effective unless and until approved by the President.

Likewise, 24 C.F.R. § 1.4(b) contains no provision relative to selection of sites outside of areas of racial concentration. The only place where such provision appears is in paragraph 4(g) of HUD's Low Rent Housing Manual, Sec. 205.1.

Appellant did stipulate that HUD's Low Rent Housing Manual was a regulation, but later found that it was incorrect. It did not feel bound by that stipulation since it involved a mistake of law. The manual is not contained in the Federal Regulations, nor was it shown that it had presidential approval.

While HUD's manual contains guidelines concerning the conditions under which housing projects may obtain federal financing, in our judgment the manual does not rise to the dignity of federal law; but even if it did, the Charter of the City of Lansing providing for initiative and referendum does not conflict with it. As we will show below, the referendum was not discriminatory but was founded on neutral principles.

The District Court also relied on the Kerner Commission Report, but obviously such report is not a federal regulation. Thus the provisions of Lansing's Charter conflict with no federal law.

Racial Motivation

It must have been a "shock" to the City for plaintiffs to claim, and for the District Court to hold, "that the conducting of this referendum makes the City of Lansing a partner in discrimination in violation of the Constitution," (293 F.Supp. at 311 (1969)) for it was the City that established the Housing Commission; that originated the project and applied to HUD for the financing of it; that enacted the ordinance providing for the variance in the zoning; that approved the plans and specifications of the developer; that refused to accept the referendum petition; that resisted the mandamus action in the Circuit Court; that appealed the adverse decision of the Circuit Court to the Michigan Court of Appeals; that co-operated in every respect with the housing project until the mandamus decision became final, when the City had no choice but to place the issue on the ballot as ordered by the Court or take the consequences of being held in contempt.

The only purpose in naming the City as a partner was to establish state action inasmuch as private acts of discrimination are not unconstitutional.

In holding that the referendum was motivated by racial factors, the District Court necessarily had to reach that conclusion by searching the minds of 15% of the electorate who signed the referendum petition, and the remaining 85% who were enjoined from voting, none of whom were called as witnesses to testify in the case. The Committee For Individual Homes which circulated the petition was not made a party to the action in the District Court.

The Court relied upon opinion evidence to support its findings as to discrimination. City Planner Guernsey, who attended a public meeting, testified that residents in the area were opposed to low income people being moved there, many of whom were black. He did not indicate that the opposition was on racial grounds. He testified that there was opposition to overloading the schools in the district, and to the change of zoning from "A" one-family, to the higher density and multiple family housing.

People also stated that they had purchased their homes when the area was zoned for single family residences and did not think it was proper to change it. Guernsey also testified that shortly prior to the present project the residents in the area objected to the rezoning of land located 1000 to 1500 feet to the west, from "A" one-family to "D-M" multiple family, which was a private development not involving low income housing. The Planning Board sustained the objections; City Council concurred, and the property was not rezoned.

The District Court also relied on testimony of Dr. Goldnor, not a resident of Lansing, who undertook to give his opinion that the motivation of the middle class whites would be to exclude black and poor people from the neighborhood. Although he had no experience in Lansing, Dr. Goldner testified:

"Unless the people of Lansing that we are considering are much different than other people that have been studied rather extensively, I would say that their motivation is to keep out black and poor people."

On cross-examination, however, he limited his previous answer:

"Q. Now, you did state, however, that the motivation of the people of the City of Lansing was to keep out black and poor people.

"A. No, sir. I said that, as I recall my own remarks, I said that I was not commenting upon the intent but upon the effect of their actions."

In our judgment, this type of opinion evidence does not support the findings of discrimination made by the District Court. But if the electors had a legal right to a referendum, their motive in exercising that right would be immaterial.

City Planner Guernsey further testified that without changing the zoning ordinance, low income housing can be built in an "A" one-family residential district. This would permit construction of the one hundred houses for the poor black and Mexican-Americans, but not the five-story low rent apartment for the elderly. Thus the existing zoning does not discriminate against poor blacks, Mexican-Americans, or any others who are free to move into the area in low-cost homes.

We have no way of knowing whether the Lansing voters would have repealed the zoning variance if they had not been enjoined by the District Court from voting on the resolution. But even had they repealed the variance, this would not violate the Fourteenth Amendment. In *Hunter* v. *Erickson,* 393 U.S. 385 at 390 (1969), Mr. Justice White, who wrote the opinion for the Court, stated in footnote 5:

"Thus, we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment."

Justice Harlan pointed out in an opinion concurred in by Justice Stewart, that referendum may not be attacked on Equal Protection grounds since it is founded on neutral principles. In view of this, the finding that the City of Lansing in complying with a mandamus order was a partner in the discrimination, is clearly erroneous.

Initiative and referendum is an important part of the state's legislative process. Being founded on neutral principles, it should be exempt from Federal Court constraints. *Spaulding* v. *Blair,* 403 F.2d 862 (4th Cir. 1968).

Reitman v. *Mulkey,* 387 U.S. 369 (1967), relied on by the District Court, is inapposite. In that case an effort had been made by a mandamus action to keep the proposal to amend California's Constitution off the ballot, but the Supreme Court of California ruled it would be more appropriate to pass upon the legal questions after the election rather "than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls." *Mulkey* v. *Reitman,* 64 Cal. 529, 535, 413 Pac. 825, 829 (1966). The California Supreme Court considered the proposal after election and held that it did more than merely repeal existing law but authorized discrimination in the housing market and was unconstitutional. The Supreme Court of the United States affirmed.

Reliance on *Otey* v. *Common Council of the City of Milwaukee,* 281 F.Supp. 264 (D.C.E.D.Wis. 1968) is misplaced. In that case the District Court did indeed enjoin an election on an initiative proposal which prohibited the City Council of Milwaukee from enacting any ordinance restricting the right of owners of real estate to sell, lease or rent

property. The Court held that the proposal, if passed, would be unconstitutional. Another reason of the Court for enjoining the election was to prevent a threatened riot.

We believe the better practice was that followed by the Supreme Court of California in *Reitman,* which allowed the election to proceed and ruled on the validity of the measure after its passage.

Nor do we think that citizens should be deprived of their right of suffrage merely because a riot was threatened. It would be more appropriate to enjoin unlawful acts of rioters than to deprive the electorate of their right of franchise. In the present case no riot was even threatened.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

Statutes and Regulations Involved

This case involves the following statutes and regulations:

1. Title 42 U.S.C. § 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

2. Title 42 U.S.C. § 2000d-1.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so

found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

3. Title 42 U.S.C. § 3601.

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

4. Title 42 U.S.C. § 3608(d).

(d) The Secretary of Housing and Urban Development shall—

* * *

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.

5. 24 C.F.R. §§ 1.4(a) and (b) (2).

(a) *General.* No person in the United States, shall, on the ground of race, color, or national origin, be excluded

from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity to which this Part 1 applies.

(b) *Specific discriminatory actions prohibited.*

* * *

(2) A recipient, in determining the location or types of housing, accommodations, facilities, services, financial aid, or other benefits which will be provided under any such program or activity, or the class of persons to whom, or the situations in which, such housing, accommodations, facilities, services, financial aid, or other benefits will be provided under any such program or activity, or the class of persons to be afforded an opportunity to participate in any such program or activity, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race, color, or national origin.

6. United States Department of Housing and Urban Development, Low-Rent Housing Handbook, RHA 7410.1, Chapter 1, Section 1.

CHAPTER 1. SITE SELECTION AND APPROVAL

1. *Introduction.* This Section sets forth criteria to be used in judging the suitability of sites proposed for low-rent housing and procedures for obtaining HUD approval of sites. . . .

Statutes and Regulations Involved

2. *Criteria for Site Selection*

a. *General.* Important considerations involved in site selection include:

* * *

(6) The suitability of the site from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964 and agency regulations and requirements issued pursuant thereto (and of Executive Order 11063, with respect to creed).

* * *

g. *Nondiscrimination in Housing.* Section 1.4(b)(2) of the regulations of the Department of Housing and Urban Development issued under Title VI of the Civil Rights Act of 1964 provides in pertinent part that:

"A recipient [Local Authority], in determining the location or types of housing, accommodations, facilities, services, financial aid, or other benefits which will be provided * * * may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race, color, or national origin."

The housing on the site to be selected must be operated in accordance with all applicable requirements of Title VI of the Civil Rights Act of 1964 and of

Statutes and Regulations Involved

Executive Order 11063, and Department regulations and requirements issued pursuant thereto. The aim of a Local Authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed, or national origin, thereby affording members of minority groups an opportunity to locate outside of areas of concentration of their own minority group. Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration and submission of either (1) alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing or (2) a clear showing, factually substantiated, that no acceptable sites are available outside the areas of racial concentration. Such submissions by Local Authorities may be made to the HAO Production Representative and Realty Officer for inclusion in their report. (See paragraph 6b below.)

The words "acceptable sites are available" in clause (2) above shall be interpreted as referring to sites which meet HUD criteria for low-rent housing and which can be acquired by the Local Authority for low-rent housing use by negotiation or condemnation, at prices within economically feasible cost limitations. Where a Local Authority proposes to locate housing only in areas of racial concentration, alleging that certain otherwise acceptable sites outside the areas of racial concentration are not available

because of denial by city officials of necessary rezoning or other site approval, the Local Authority shall submit a statement of the specific efforts it has made to induce the appropriate officials to grant the necessary approval, the specific responses to such efforts, and all other facts pertinent to a finding of the underlying reasons for denial of the approval. The statement will be considered by HUD in determining whether the facts substantiate that the necessary rezoning or other city approval cannot be obtained and that the reasons are consistent with the nondiscrimination requirements of Title VI. Local Authorities will be expected to utilize available means for resolving any zoning or other city impediments to compliance with Title VI site selection requirements.

The advice and assistance of the Regional Office are available to Local Authorities in respect to the selection of sites under the special conditions and considerations pertaining to any particular case.

7. Lansing, Michigan—City Charter, §§ 6.9-6.13

Initiative and Referendum.

Section 6.9. An ordinance may be initiated by petition, or a referendum on an ordinance enacted by the Council may be had by a petition, as hereinafter provided.

Initiatory or Referendary Petition.

Section 6.10. An initiatory or a referendary petition shall be signed by not less than fifteen percent of the registered electors of the city. Before being circulated for signatures, such petitions may be approved as to form by

the City Attorney. Such petition may be the aggregate of two or more petition papers. Each signer of a petition shall sign his name, and shall place thereon, after his name, the date and his place of residence by street and number, or by other customary designation. To each petition paper there shall be attached a sworn affidavit by the circulator thereof, stating that each signature thereon is the genuine signature of the person whose name it purports to be, and that it was signed in the presence of the affiant. Such petition shall be filed with the Clerk who shall, within ten days, canvass the signatures thereon to determine the sufficiency thereof. Any signatures obtained more than ninety days before the filing of such petition with the Clerk shall not be counted. If found to contain an insufficient number of signatures of registered electors of the city, or to be improper as to form or compliance with the provisions of this section, the Clerk shall notify forthwith the person filing such petition, and ten days from such notification shall be allowed for the filing of supplemental petition papers. When found sufficient and proper, the Clerk shall present the petition to the Council at its next regular meeting.

Same—Council Procedure.

Section 6.11. Upon receiving an initiatory or referendary petition from the Clerk, the Council shall, within thirty days, either:

(a) If it be an initiatory petition, adopt the ordinance as submitted in the petition or determine to submit the proposal to the electors; or

(b) If it be a referendary petition, repeal the ordinance to which the petition refers or determine to submit the proposal to the electors;

Same—Submission to Electors.

Section 6.12. Should the Council decide to submit the proposal to the electors, it shall be submitted at the next election held in the city for any purpose, or, in the discretion of the Council, at a special election. The result shall be determined by a majority vote of the electors voting thereon, except in cases where otherwise required by law.

Same—Ordinance Suspended.

Section 6.13. The certification by the Clerk of the sufficiency of a referendary petition within thirty days after the passage of the ordinance to which such petition refers shall automatically suspend the operation of the ordinance in question pending repeal by the Council or final determination by the electors. An ordinance adopted by the electorate through initiatory proceedings may not be amended or repealed by the Council for a period of two years after the date of the election at which it was adopted. Should two or more ordinances, adopted at the same election, have conflicting provisions, the one receiving the highest affirmative vote shall prevail as to those provisions.

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8. Lansing, Michigan—Zoning Ordinance, §§36-7, 36-17, 36-44.

SEC. 36-7. COMMUNITY UNIT PLAN.

The owner or owners of any tract of land comprising an area of not less than one acre may submit to the city council a plan for the use and development of all of the tract of land for residential and accessory commercial

purposes or for the repair and alteration of any existing housing development on an area comprising one acre or more. The development or alteration plan shall be referred to the planning board for study and report and for public hearing. If the board approves the plans, they, together with the recommendation of the board shall then be submitted to the city council for consideration and approval. The recommendation of the board shall be accompanied by a report stating the reasons for approval of the application and specific evidence and facts showing that the proposed community unit plan meets the following conditions:

(1) That property adjacent to the area included in the plan will not be adversely affected.

(2) That the plan is consistent with the intent and purpose of this chapter to promote public health, safety, morals and general welfare.

(3) That the buildings shall be used only for single-family dwellings, two-family dwellings, or multiple dwellings and the usual accessory uses such as garages, storage space and community activities, including churches.

If the city council approves the plans, building permits and certificates of occupancy may be issued even though the use of land, average lot area per family, the height of the building or buildings, and the location of the buildings to be erected in the area and the yards and open spaces contemplated by the plan do not conform in all respects to the district regulations of the district in which it is located. (Ord. No. 38, § 1, 1-8-62; Ord. No. 50, § 1, 9-17-62)

Statutes and Regulations Involved

SEC. 36-17. "A-A" AND "A" DISTRICTS—PERMITTED USES.

In the "A-A" and "A" one-family districts no building or land shall be used and no building shall be hereafter erected, converted or structurally altered, unless otherwise provided in this chapter, except for one or more of the following uses:

(1) One-family dwellings.

(2) Public parks and playgrounds.

(3) Public schools, elementary and high, and other educational institutions with curriculum equivalent to a public elementary school or public high school.

* * *

SEC. 36-44. "A" AND "B" DISTRICTS.

In the "A" one-family and the "B" residence districts the height of buildings, the minimum dimensions of yards and the minimum lot area per family shall be as follows:

(1) *Height.* No building hereafter erected or structurally altered shall exceed two and one-half stories or thirty-five feet, except as provided in section 36-54.

(2) *Rear yard.* In an "A" one-family district there shall be a rear yard having a depth of not less than thirty feet and in a "B" residence district there shall be a rear yard of not less than twenty-five feet, except as provided in section 36-54.

(3) *Side yard.* There shall be a side yard on each side of a building having a width of not less than ten per cent of the average width of the lot, provided,

however, in an "A" one-family district such side yard shall not be less than five feet in width and in a "B" residence district such side yard shall not be less than four feet in width, provided that lots of record at the time of passage of ordinance number 154 that are forty feet or less in width may have a side yard of three feet. (See sections 36-54 and 36-7.)

(4) *Front yard.* In an "A" one-family district there shall be a front yard having a depth of not less than twenty-five feet to the front line of the building and not less than fifteen feet to the front line of an open porch or paved terrace.

Where a lot is located at the intersection of two or more streets, there shall be a front yard on each street side of a corner lot, except that the buildable width of such lot shall not be reduced to less than twenty-five feet. No accessory building shall project beyond the front yard line on either street.

In a "B" residence district the depth of the front yard shall not be less than twenty feet to the front line of the building and not less than twelve feet to the front line of an open porch or paved terrace.

Provided, however, where lots comprising forty per cent or more of the frontage, between intersecting streets, are developed with buildings having an average front yard with a variation in depth of not more than six feet, no building hereafter erected or structurally altered shall project beyond the average front yard line so established, provided, further, this regulation shall not be so

interpreted as to require a front yard of more than fifty feet.

(5) *Lot area per family.* In an "A" one-family district every building hereafter erected or structurally altered shall provide a lot area of not less than five thousand square feet per family.

In a "B" residence district every building hereafter erected or structurally altered shall provide a lot area of not less than four thousand square feet per family.

Provided, however, where a lot has less area than herein required and was of record at the time of the passage of ordinance number 154 such lot may be occupied by a single-family dwelling, which may be structurally altered, and the usual accessory buildings.